APPENDIX A

UNITED STATES DISTRICT COURT
for the
Northern District of Illinois
Eastern Division

CITY OF CHICAGO, et al., *Plaintiffs,* vs. UNITED STATES OF AMERICA, et al., *Defendants.*	)	No. 68 C 956
TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Plaintiffs,* vs. UNITED STATES OF AMERICA, et al., *Defendants.*	)	No. 68 C 1666

ORDER

This cause is before this three-judge court on the motion of plaintiffs and intervening plaintiffs, on mandate of the Supreme Court of the United States, issued January 5, 1970 in Nos. 101 & 102, Oct. Term 1969, *City of Chicago* v. *United States,* (1) to reinstate the temporary restraining order in case No. 68 C 1666 and (2) to remand cause No. 68 C 1666 to the Interstate Commerce Commission, upon grant of plaintiffs' motion for summary judgment in No. 68 C 956.

The court has considered the opinion of the Supreme Court of the United States and the mandate issued thereon, and being fully advised in the premises,

It is ordered that both causes numbered 68 C 956 and 68 C 1666 be remanded to the Interstate Commerce Commission for further hearings.

It is further ordered that the motion made herein to reinstate the restraining order in said cause No. 68 C 1666 be held under advisement until the Interstate Commerce Commission concludes its hearings and makes its report and enters a final order therein.

/s/ *Wm G. Knoch*
United States Circuit Judge
/s/ *J. Sam Perry*
United States District Judge
/s/ *Edwin A. Robson*
United States District Judge

Dated: Chicago, Illinois
February 5, 1970

APPENDIX B

UNITED STATES DISTRICT COURT
for the
Northern District of Illinois
Eastern Division

CITY OF CHICAGO, et al., *Plaintiffs,*	)	
vs.	)	No. 68 C 956
UNITED STATES OF AMERICA, et al., *Defendants.*	)	
TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Plaintiffs,*	)	
vs.	)	No. 68 C 1666
UNITED STATES OF AMERICA, et al., *Defendants.*	)	

ORDER

Following the filing of a copy of the mandate of the Supreme Court of the United States herein with the Clerk of the District Court, this three-judge court on February 5, 1970 entered an order wherein it (1) remanded both causes numbered 68 C 956 and 68 C 1666 to the Interstate Commerce Commission ("I.C.C.") for further proceedings and (2) held under advisement the motion made by plaintiffs and intervening plaintiffs to reinstate the temporary restraining order in case 68 C 1666 until the conclusion of the proceedings before the I.C.C.

Thereafter the various parties filed various motions and the three-judge court now has before it (1) motion of defendant Chicago & Eastern Illinois Railroad Company ("C&EI") for rehearing or amendment of said order of

February 5, 1970; (2) motion of defendant Louisville and Nashville Railroad Company ("L&N") for rehearing and amendment of said order; (3) motion of defendants United States of America and I.C.C. for a new trial in both cases with memorandum in support thereof; (4) motion of plaintiffs and intervening plaintiffs for reconsideration and amendment of said February 5 order with memorandum in support thereof; (5) response of plaintiffs and intervening plaintiffs to the aforesaid motions of defendants; (6) response of defendant C&EI to plaintiffs' and intervening plaintiffs' motion, and (7) response of defendant L&N to plaintiffs' and intervening plaintiffs' motion.

The Court has considered all the foregoing motions, the responses and memoranda of the parties hereto and the opinion of the Supreme Court herein and is of the opinion that it should reconsider its order of February 5, 1970 and should modify and amend said order as hereinafter set forth in view of the additional facts and law presented to the Court.

It is, therefore, ORDERED, that the order of this Court entered herein on February 5, 1970 be and the same is hereby vacated.

The Court also has before it a motion by plaintiffs to consolidate cause No. 68 C 1666 with cause No. 68 C 956 on the ground that the two actions involve a common question of law and fact. Said motion was filed September 6, 1968, briefed and argued before the three-judge court on November 4, 1968. The Court reserved its ruling on same. The Supreme Court of the United States consolidated these cases for hearing and it is the opinion of this Court that the plaintiffs' motion to consolidate should now be granted.

It is, therefore, ORDERED that cause No. 68 C 956 and cause No. 68 C 1666 be and they are hereby consolidated.

The Court is of the opinion that it is equitable and in the best interest of the general public to maintain the status quo which existed on September 6, 1968 until further determination of these causes, as was originally done by entry of a restraining order in case No. 68 C 1666 by Judge Edwin A. Robson on that date, immediately after the filing of this suit, and which restraining order against discontinuance of the "Hummingbird" trains by the L&N was continued in full force and effect on September 12, 1968 by Judge Joseph Sam Perry. The temporary restraining order was heretofore dissolved by the Court in its order of January 8, 1969 granting the motion of L&N to dismiss.

Plaintiffs and intervening plaintiffs allege in their memorandum, filed February 16, 1970, that the L&N promised "restoration of the train service to the Circuit Justice" and that allegation has not been denied.

The Court finds that the L&N, in its Memorandum in opposition to application to stay, represented to the Circuit Justice on January 10, 1969 the following:

> "... petitioners will have full right to pursue their statutory appeal to this Court, and if this Court should determine, upon full consideration, that the question of the operation of the trains should be examined by the Court below, the respondent railroad company will be fully answerable. In other words, the respondent railroad company will promptly resume the operation of the trains if required to do so by lawful order." (L&N Memorandum in Opposition to the Application to Stay, p. 8)

The L&N also submitted to this three-judge court at the September 12, 1968 hearing an affidavit stating:

> "Trains Nos. 6 and 7 can be put back in operation within a matter of less than twenty-four hours upon the dissolution of the court's order, since none of the equipment that is used in operating these trains will now be disposed of, and it will be kept in operating condition." (Affidavit of Jack Small, 9/10/68, pp. 1-2)

Defendants United States of America and I.C.C. have not interposed any objection to the motion of plaintiffs and intervening plaintiffs for reinstatement of the aforesaid restraining order against the L&N.

The Court finds that in a recent (December 3, 1969) decision of the I.C.C., 336 I.C.C. at 85, the Commission states:

> "In *Missouri Pac. R. Co.-Control-Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), sustained *sub nom. Illinois Central Railroad Company* v. *United States*, 263 F. Supp. 421, affirmed per curiam 385 U.S. 457 (1967), C&EI's Chicago-Evansville line was awarded to L&N rather than Illinois Central, *one of the important considerations in the Commission's determination being the anticipated maintenance and improvement of through passenger service between Chicago and the South via the C&EI and L&N route. . . .*" (Emphasis supplied)

The Illinois Central Railroad continues to run trains to and from the South and so should the L&N continue to operate the "Hummingbird" trains pending final determination herein.

The Court finds that the I.C.C. is without jurisdiction to order interim relief beyond a four month period in connection with the "Hummingbird" trains pending the

Commission's further proceedings herein. The Court itself does have jurisdiction to reinstate operation of the "Hummingbird" trains pending the Commission's further proceedings herein.

It is, therefore, ORDERED that the restraining order entered herein on September 6, 1968, and continued September 12, 1968, be and the same is hereby reinstated to become effective within ten (10) days of the date of this order.

The three-judge court also is of the opinion that the I.C.C. should also reopen its investigations in the matter of the "Georgian" trains (Chicago-Evansville) involved in case No. 68 C 956, with due and proper notice to all parties in interest, and that the matters involved in cases 68 C 956 and 68 C 1666 should be consolidated by the I.C.C. in further proceedings.

The Court finds that in the proceedings before the I.C.C. relating to the discontinuance of the C&EI's "Georgian" trains the public did not receive adequate notice from the railroads or of the I.C.C. proceedings; and, further, although the residents of the States of Kentucky, Tennessee and Georgia were vitally interested in continued through passenger service by the railroads and the respective governors of those States were entitled to notice of the proceedings before the I.C.C., no notice was given them beforehand.

The Court is of the view that through passenger service from Chicago to and throughout the Southeastern part of the United States might or could be vital to the general public interest and that such service is so interwoven and entwined between the various railroads that only in a consolidated proceeding can a just and fair decision be reached.

It is, therefore, ORDERED that the orders of the I.C.C. in its Finance Docket Nos. 24725 and 25047, in so far as such orders discontinue the respective investigations, be and they hereby are vacated and that both causes numbered 68 C 956 and 68 C 1666 be and they hereby are remanded to the I.C.C. and consolidated for further proceedings in accordance with the statutes so made and provided.

The Court enters the above orders in conformity with the opinion of the Supreme Court of the United States and for the purpose of carrying out the Supreme Court's mandate.

/s/ Win G. Knoch
Circuit Judge
/s/ J. Sam Perry
District Judge
/s/ Edwin A. Robson
District Judge

Dated: Chicago, Illinois,
March 19, 1970.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL., AND EVANSVILLE, IND.

Decided January 25, 1968.

Upon investigation, found that operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by public convenience and necessity, and that the continued operation thereof will unduly burden interstate commerce. Investigation discontinued.

James H. Durkin and *Edwin Richardson* for rail carrier.

J. Fred Parker for Georgia Public Service Commission, protestant.

William H. Wilson for Public Service Commission of Indiana, protestant.

Mary Louise Wolford for the public of the State of Indiana, protestant.

Edward G. Finnegan, Leon J. Heidgen and *James A. Parker* for Illinois Commerce Commission, protestant.

Harold Cowen and *Bernard Rane* for city of Chicago, Ill., protestant.

Robert S. Matthews and *Ronald Warrum* for city of Evansville, Ind., protestant.

Keith E. Roberts for village of Milford, Ill., and city of Watseka, protestants.

William E. Nelson for city of Hoopeston, Ill., protestant.

Marion E. Wright for city of Danville, Ill., protestant.

Robert F. Doolittle, Jr. for city of Vincennes, Ind., protestant.

Frederick T. Bauer for city of Terre Haute, Ind., protestant.

Raymond J. Kearns for Sisters of Providence, St. Mary of the Woods, Ind., protestant.

William P. Byroad, Gordon E. Cox, B. L. Dresbach, Thomas J. Duggan, George B. Lee, J. Thomas McNeal, William E. Nelson, Earl G. Quinn, Keith E. Roberts, J. H. Smith, and *George P. Sheahan* for various railway labor organizations.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, BUSH, AND STAFFORD

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act as amended, the Chicago & Eastern Illinois Railroad Company (C&EI), a common carrier by railroad subject to the provisions of part I of the act, on August 31, 1967, filed notices and supporting statements in which it proposed to discontinue, effective October 1, 1967, service by its interstate passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., a distance of 287 miles. Copies of the notices were duly served and posted in the manner required by section 13a(1) and our rules and regulations thereunder.

By petition filed concurrently in Finance Docket No. 24726, C&EI seeks authority under section 13a(2) to discontinue service by its intrastate passenger trains Nos. 3 and 4 between Chicago and Danville, Ill. That proceeding is the subject of a report and recommended order[1] of the hearing examiner served separately. C&EI's application filed with the Illinois Commerce Commission for authority to discontinue trains Nos. 3 and 4 was denied by that body on September 20, 1967. Appropriate notice of the petition filed here in Finance Docket No. 24726 was served on the Governor of the State of Illinois.

Protests to C&EI's proposal in the titled proceeding were filed by communities along the line and State, civic, business, and railway labor interests, as well as users of the trains. By order of September 18, 1967, we instituted an investigation and required continued operation of trains Nos. 93 and 54 pending a hearing and decision (up to the statutory maximum of four months). Because of the statutory limitation on the time available for investigation and decision, our order provided for omission in the titled proceeding of a report and recommended order by the examiner as part of the decisional process and for certification of the record to us for initial decision.

Public hearings were held in Chicago, Momence, Watseka, Hoopeston and Danville, Ill., and Evansville, Vincennes, and Terre Haute, Ind., on a consolidated record with the section 13a(2) proceeding in Finance Docket No.

[1] By petition filed December 14, 1967, C&EI sought omission of the examiner's report and recommended order in Finance Docket No. 24726 and consolidation of that matter with this proceeding. Replies thereto were filed by certain protestants, and by order entered January 8, 1968 the petition was denied.

24726. Briefs were filed by C&EI, the Illinois Commerce Commission, and jointly by the village of Milford, the cities of Watseka, Danville and Hoopeston, Ill., and the Brotherhood of Railroad Trainmen.

At the hearing protestants moved for dismissal of the proceedings on several grounds, principally that since Missouri Pacific Railroad Company (MoPac) controls C&EI, use of financial data relating only to C&EI and excluding MoPac is grossly misleading and contrary to the provisions of the act. Other relief sought included suspension or termination of the proceedings and oral argument on the motion. C&EI replied in opposition, and the motion was taken under advisement. The protestants pursue the argument on brief.

The motion is denied. Oral argument is not warranted. By contending MoPac is a necessary party to these proceedings, protestants ignore the plain language of section 13a of the act, which confers upon this Commission jurisdiction over proposed passenger train discontinuances by "a carrier or carriers subject to this chapter." Clearly, C&EI falls within the term "a carrier" subject to part I of the act. Whether or not the statutory standards for ordering a continuance of service are met is a matter which, in this case, does not depend (as will later be made clear) upon the corporate relationship of MoPac and C&EI. Piercing the corporate veil may be warranted in some situations, as for example, where false and misleading representations are made or where some unlawfulness may be involved, and perhaps in other circumstances, but here no such question is raised and no substantial reason is advanced to pursue that course. The record indicates that C&EI is the proper party in interest and that it has fully cooperated in presenting the data required for our action.

Train Nos. 93 and 54 operate on the following schedules:

Train No. 93 daily	Miles		Stations		Train No. 54 daily
P.M.					A.M.
3:45	C.J	Lv.	Chicago, Ill.	Ar.	10:35
3:59	6.6		Chicago (63rd St.)		10:21
A4:30	28.8		Steger	E	9:44
.....	77.5		Watseka	G	8:49
6:10	123.2		Danville		7:55
7:15	177.5		Terre Haute, Ind.		6:40
B7:45	203.7		Sullivan	G	6:11
8:18	234.7		Vincennes		5:40
D8:50	259.0		Princeton		5:05
9:55	287.2	Ar.	Evansville	Lv.	4:30

A—Stops to receive passengers.
B—Stops to discharge revenue passengers from Chicago and Steger.
D—Stops to discharge or receive revenue passengers.
E—Stops to discharge passengers.
G—Stops to receive revenue passengers for Chicago.

Their operation is in conjunction with trains of the Louisville & Nashville Railroad (L&N) similarly designated, which operate between Evansville and Atlanta, Ga., and Montgomery, Ala. The interchange is at Evansville. The L&N splits its southbound No. 93 at Nashville, Tenn., with one section terminating at Atlanta and the other at Montgomery. L&N originates one section of its northbound train No. 54 at Atlanta and the other at Montgomery, and consolidates the two at Nashville.

The trains, designated "The Georgia—Hummingbird," carry passengers and baggage. They are powered with three diesel locomotives, and have a consist of 10 regularly

assigned cars daily with 11 cars on Friday, Saturday and Sunday. Train No. 93 leaves Chicago with a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches destined to Atlanta daily; a coach destined to Evansville on Friday, Saturday and Sunday; two coaches destined to Montgomery daily; and a sleeper destined to Mobile daily. Train No. 54 has a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches originating at Atlanta daily; a coach originating at Evansville on Friday, Saturday and Sunday; two coaches originating at Montgomery daily; and a sleeper originating at Mobile daily; all cars having destination to Chicago. The passenger-carrying equipment is air-conditioned.

Due to a restructuring of mail service by the U. S. Post Office Department, the mail cars were discontinued as of June 10, 1967, except for one storage-mail car from Chicago to Birmingham, Ala., and in October 1967, the Post Office Department removed that car. The mail handled in the baggage-mail car is minimal. Train No. 93 still carries express traffic for the account of Railway Express Agency, Inc., destined to Chattanooga. These trains do not handle the express to or from C&EI points south of Chicago.

Alternate passenger transportation service to and from the communities served by C&EI between Chicago and Evansville, and south thereof served by L&N is available by bus and by air at most points. There are four flights daily southbound and three northbound between Chicago and Danville; two flights daily southbound and three northbound between Chicago and Terre Haute; and four flights daily southbound and five northbound between Chicago and Evansville. Numerous flights are scheduled between Chicago, on the one hand, and, on the other, Atlanta,

Chattanooga, Birmingham, Nashville, Montgomery, and Mobile, and between Evansville and Atlanta. Watseka and Hoopeston, Ill., Sullivan, Vincennes and Princeton, Ind., have no air service.

A major bus line operates three southbound and four northbound buses daily between Chicago and Evansville, with stops at all intermediate points served by the subject trains. Rail transportation is available, though limited, (a) by C&EI trains Nos. 3 and 4 between Chicago and Danville (but those are the trains involved in Finance Docket No. 24726, the discontinuance proceeding referred to above) and (b) by Illinois Central Railroad (IC) between Chicago and Carbondale, Ill., and points south thereof (four trains daily in each direction). Highway distances between communities served by C&EI and those served by IC in Illinois vary from 12 to 35 miles. Bus fares are lower than rail fares between Chicago and all points served by the subject trains, except Sullivan, Ind. Air fares are higher than rail or bus.

C&EI maintains that it has lost patronage to the private passenger automobile (as a mode of intercity transportation), and, as evidence thereof, introduced statistics showing the increase in the number of registered automobiles in the counties of Illinois and Indiana traversed by the subject trains. Considering the five Illinois counties (Cook, Will, Kankakee, Iroquois, and Vermillion) and the six Indiana counties (Park, Vigo, Sullivan, Knox, Gibson, and Vanderburg) it was shown that in 1960 the Illinois counties had 1,653,520 registrations while the Indiana counties had 132,253, and that by 1966, there was an increase of about 20 percent—to 1,994,751 in the Illinois counties and 158,186 the Indiana counties.

For the benefit of automobile users, Illinois Highway 1 between Chicago and Danville and U. S. Highway 41 between Danville and Evansville are adjacent to and parallel the line of C&EI. Also U. S. Highway 41 continues northward in Indiana east of Illinois Highway 1 to Chicago. Both are first class highways and U. S. Highway 41 has substantial segments with four lanes. A number of witnesses testified to the effect that driving on the highways is dangerous. South of Chicago and its suburbs the roads traverse sparsely populated areas, are generally straight and the terrain is flat.

The population[2] at the points served by the subject trains was shown as follows: Chicago 3,550,404, Chicago Heights 41,000, Watseka 5,219, Hoopeston 6,606, Danville 41,856, Terre Haute 72,500, Sullivan 4,979, Vincennes 18,046, Princeton 7,906, and Evansville 141,543.

A number of those points have commercial or service areas extending beyond their corporate limits and the population reflected by such areas is larger than for the point involved.

During the periods 1965, 1966 and first 6 months of 1967, train No. 93 carried 84,259, 82,213 and 31,913 passengers, respectively, of which 53,344, 56,230, and 20,952 were delivered to L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 230, 225, and 176, respectively, of which 84, 71, and 60, respectively, were local passengers (traveling between C&EI stations). During the same

[2] Based on the census taken in 1960. Since that time, some of the areas served have had population increases.

periods, train No. 54 carried 76,854, 75,271, and 28,186 revenue passengers, respectively, of which 57,983, 60,063 and 21,682, were received from L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 210, 205, and 153, of which 51, 40, and 33, respectively, were local. The foregoing data were determined from analysis of records of tickets collected by conductors, cash fares received, and tickets honored but not collected, apportioned to the subject trains according to the number of miles traveled thereon.

The supporting studies also show the numbers of passengers boarding and deboarding at each station. Considering the last 6 months of 1967 as representing the present level of patronage, of the 176 passengers on train No. 93, an average of 156 boarded at Chicago, 12 at Steger, 5 at Danville, 2 at Terre Haute and 1 at Vincennes, and 17 left the train at Danville, 20 at Terre Haute, 1 at Sullivan, 7 at Vincennes, 2 at Princeton, 13 at Evansville, and 116 continued on the L&N. Of the 153 passengers on train No. 54 an average of 120 were through passengers from the L&N, 12 boarded at Evansville, 2 at Princeton, 6 at Vincennes, 1 at Sullivan, 11 at Terre Haute, 4 at Danville, and 1 at Watseka, and 3 left the train at Terre Haute, 3 at Danville, 8 at Steger and 139 at Chicago. Thus, the record shows that the C&EI points south of Chicago have had few passengers boarding or leaving the trains.

C&EI's balance sheet statement as of July 31, 1967, shows assets aggregating $119,182,901, including current assets of $10,220,039, special funds $484,841, investments $10,941,671, total properties less depreciation and amortization $96,182,478, and other assets and deferred charges $1,353,872. Liabilities were: current liabilities of $9,631,117, long-term debt of $53,494,944 (including $3,103,470

due within 1 year), reserves $659,983, other liabilities and deferred credits $619,844, capital stock $29,837,372, capital surplus $112,522, and retained income $24,827,119. Its income statements for 1965, 1966 and first 7 months of 1967, show railway operating revenues of $40,578,936, $41,780,952, and $23,604,275; net railway operating income of $3,486,070, $4,091,786, and a deficit of $1,005,900; and net income after fixed charges and other deductions of $1,736,086, $2,853,372, and a net deficit of $1,757,265, respectively.

C&EI has incurred annual net railway operating deficits in its passenger service in amounts in excess of $1 million for the years 1962 through 1966, inclusive. More than 20 percent of freight net income has been required to subsidize these rail passenger deficits in each of the years 1957 through 1966, except 1959 when the percent of freight net income so required exceeded 12 percent. C&EI estimates that the national award of September 16, 1967 to the shopcraft employees, retroactive to January 1, 1967, will increase its labor costs by $210,000 in 1967 and by $321,000 in 1968. Further, a recent agreement with the Brotherhood of Locomotive Engineers will result in payment of $100,000 to C&EI locomotive engineers in backpay. None of those additional expenses were included in determining the cost of operating the subject trains during the first 6 months of 1967, or in projections made.

C&EI shows data respecting the financial results of the operation of the trains for the years 1965, 1966, and the first 6 months of 1967. In 1965, train No. 93 had revenues (passenger, diner, express and mail) of $1,096,607 and out-

of-pocket expenses of $1,001,950 for a net income of $94,-657. For the same year, train No. 54 had similar revenues of $811,156, and out-of-pocket expenses of $862,270 for a net out-of-pocket loss of $51,114. In 1966, the corresponding figures for train No. 93 were $1,083,494 revenues, $1,125,287 costs, and $41,793 deficit; for train No. 54 they were $816,863 revenues, $1,022,127 costs, and $205,264 deficit; the combined net loss for both trains was $247,037. In the first 6 months of 1967, the corresponding figures for train No. 93 were $420,167 revenues, $522,421 costs, and $102,254 deficit, and for train No. 54, $311,281 revenues, $477,387 costs, and $166,106 deficit; the combined net out-of-pocket loss was $268,360. Details of the revenues and expenses for those periods indicated as computed by the carrier are shown in the attached appendix A.

As indicated, actual revenues from these trains, including car-hire revenue are reflected in the data presented. The following actual expenses were also employed: Train engineman expense, traincrew expense, sleeping car expense, insurance, expenses incurred in clearing wrecks, baggage loss and damage claims, injuries to persons and dining car and buffet car service. Other expenses and savings data were computed using methods approved by the Commission in prior proceedings. Increases in expenses for 1966 over those of 1965 occurred in four accounts (a) passenger train cars—repairs, (b) equipment depreciation—passenger cars, (c) train supplies and expenses, and (d) joint facility accounts. These were the subject of detailed inquiry. On (a) an accident to train No. 93 at Hoopeston in April 1966, were required extensive repairs to passenger cars ($59,506). Expenses charged to that account in 1965 were abnormally low. On (b) C&EI did not, until 1967, retire its head-end equipment used on other trains in 1965 and 1966, having made such equipment available to the U. S. Post Office Department for use in trains Nos. 93 and 54. Retirements of head-end equipment in 1967,

when mail was removed from all C&EI passenger trains amounted to $365,549, but this increase in expense was not reflected in the financial results discussed above. In projecting revenues and expenses involved in operating the subject trains without the mail revenue equipment, depreciation on only those cars which would be required to operate the subject trains without any head-end business was considered. On (c) the total passenger portion of the account actually decreased in 1966, but spreading the expense over fewer trains than in 1965, resulted in an increased allocation to the remaining trains. On (d) the increase in joint facility expenses in 1966 was due to the discontinuance of passenger trains by other railroads using such facilities, which added proportionally to the expense burden on the remaining trains.

Trains Nos. 93 and 54 use joint facilities at Chicago with four other railroads, and with one other at Terre Haute, Vincennes, and Evansville. During the first 6 months of 1967, no C&EI passenger trains, other than the subject trains used the Terre Haute, Vincennes and Evansville facilities, and as a result, all of the amounts paid for use of those facilities ($25,356, $18,136, and $104,328, respectively) are savable. Joint facility costs were computed in accordance with those methods and standards approved in *Chicago, R. I. & P. Co., Discontinuance of Trains*, 328 I.C.C. 278.

The foregoing data reflect revenues received by C&EI for transportation of mail. Projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, using 1966 revenue data, show that C&EI would incur an annual loss of $242,850 in the operation of train No. 93 and $191,780 in the operation of train No. 54. In projecting equipment depreciation and other expense items only the

equipment that actually would be used was considered. The projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, were shown as follows:

	Train No. 93	Train No. 54
Revenues:		
102 Coach[1]	$532,953	$468,549
102 First class[1]	87,680	113,593
103-108 Baggage and other[1]	2,270	1,153
107 Express[2]	587	34,909
131 Dining and buffet[1]	47,844	47,844
Total revenue	671,334	666,048
505-538 Car-hire, net[3]	4,785	4,785
Revenue and income	676,119	670,833
Total expense	918,969	862,563
Profit or loss	(242,850)	(191,730)
Expenses:		
Maintenance of equipment—		
311 Repairs, diesel locomotives[4]	53,406	53,390
317 Passenger train car repairs[5]	141,817	141,817
331 Equipment depreciation—locomotive[6]	8,760	8,760
331 Equipment depreciation—cars[7]	30,103	30,103
335 Employee health and welfare benefits[8]	2,502	2,502
Traffic:		
351-360 Passenger traffic[4]	21,996	16,036
Transportation:		
373 Station employees[4]	$15,650	$14,568
376 Station supplies and expense[4]	3,062	2,768
378 Yard conductor and brakeman[9]	5,532	5,532
392 Train engineman[10]	50,193	52,987
394 Train fuel[11]	30,400	30,400
397 Water for train locomotion[11]	1,781	1,781
398 Lubrication for train locomotion[11]	3,709	3,709
399 Other supplies for train locomotion[11]	168	168

		Train No. 93	Train No. 54
400	Enginehouse expense—train[11]	8,108	8,108
401	Trainmen[10]	67,844	67,134
402	Train supplies and expenses[12]	88,308	88,308
403	Operating sleeping cars[4]	49,060	37,392
409	Employee health and welfare benefits[8]	5,163	5,222
	Insurance[13]	16,405	16,405
419	Loss and damage—baggage[14]	550	480
420	Injuries to persons[14]	41,044	2,754
441	Dining and buffet service[4]	71,188	71,188
General:			
452	Clerks, accounting[4]	9,142	8,438
456	Employee health and welfare benefits[4]	360	324
	All joint facility accounts[15]	170,720	170,720
532	Railway tax accruals[16]	21,958	21,542
	Total expenses	918,969	862,563

[1] 1966 actual. The number preceding each item is the account number in the Commission's Uniform System of Accounts.

[2] Projected based on current traffic.

[3] Projected based on car assignments.

[4] Projected based on first 6 months 1967 expenses.

[5] Projected based on estimated car miles @ first 6 months 1967 cost per car mile.

[6] Based on two unit assignment.

[7] Based on cars required.

[8] Based on current G.M.A. rates applied to labor only.

[9] Based on current assignment.

[10] Based on 1966 payments plus wage increases.

[11] Based on 2 unit assignment @ first month 1967 cost per unit miles.

[12] Based on estimated car mile @ first 6 months 1967 cost per mile plus crews' lodging and meals at current costs.

[13] Based on current premiums.

[14] Based on 2.5 year average.

[15] Based on estimated car assignments.

[16] Based on current rates applied to labor only.

It is thus apparent that C&EI has incurred substantial losses in the operation of the trains Nos. 93 and 54 and that the losses will substantially increase as a result of the Post Office Department's removal of mail from those trains and the consequent discontinuance of passenger trains of other railroads using the Chicago terminal facility, although the latter factor was not considered in making the above projections.

Eight communities on the line served by the subject trains intervened in opposition: Chicago, Watseka, Milford, Hoopeston, and Danville, Ill., and Terre Haute, Vincennes, and Evansville, Ind. The trains do not serve Milford. Although some Illinois residents who ride C&EI train No. 4 northbound return on train No. 93 southbound, the witnesses testifying at communities in Illinois were primarily interested in the continued operation of trains Nos. 3 and 4. The latter are the subject of the section 13a(2) proceeding in Finance Docket No. 24726 and, under the provisions of that section, are being dealt with in the report of the hearing examiner. Indiana interveners and witnesses testifying at Indiana points were concerned with continued operation of the subject trains.

Of the 144 public witnesses who testified on the consolidated record, 90 directed their testimony in whole or in part to the subject trains. Not all use the services of the trains. Thirty-one testified on behalf of State, county, city government or municipal organizations, civic or trade organizations, and colleges or universities, and one presented the views of a Congressman. A number were concerned with rail passenger service generally, though they themselves did not use the services provided by the subject trains. With few exceptions the public witnesses de-

sire the trains continued in what would be a standby service for use as convenience in bad weather, at holiday periods and for shopping trips. No public witnesses testified at Chicago.

At Watseka, the mayor and representatives of the chamber of commerce and the County Farm Bureau indicated that, although they do not use the subject trains, there is need for rail passenger service in inducing industry to locate in the area. A surgeon testified to using the trains 20-24 times a year to and from Chicago where, he indicates, an increasing number of his patients require medical service. He owns an automobile, but does not use it on long trips.

At Hoopeston, the mayor and the president of the chamber of commerce expressed concern over rail passenger service. Testimony was given by a department store buyer and a beautician. Two personnel managers of large corporations indicated that prospective employees inquire about transportation facilities to and from Chicago. One could express no opinion as to whether discontinuance of the subject trains would have a detrimental effect on recruiting employees in Hoopeston; the other uses other trains of C&EI and was more concerned with their retention. The president of the Hoopeston Industrial Corporation points out that every prospective industry mentions transportation. A representative of a corn festival held annually each September in Hoopeston urges continuation of the service, but of the 100,000 persons attending the last occasion, he knew of only four who came by rail. The foregoing witnesses themselves rarely patronize the subject trains. Another witness rides train No. 93 during unusually heavy snowstorms when other means of travel are not available.

At Danville, municipal, commercial and other organizational spokesmen were concerned with rail passenger service generally and specifically C&EI trains other than those here involved. Several other witnesses proved to be only occasional patrons of trains Nos. 93 and 54—a bookkeeper, a number of railroad employees (who rated their on-time performance as poor), a housewife (who finds them crowded and often late), another housewife whose children sometimes use the trains going to and from colleges (particularly in bad weather), and an architect who expressed the view that the discontinuance would hamper Danville's development. Another witness who uses C&EI trains about once a month, occasionally drives his automobile to Chicago, but would not go by bus because he considers the bus routes circuitous and the service time consuming. Support for continued operation was voiced by a junior chamber of commerce spokesman for 110 members who testified that he used the trains only once, but that the majority of the membership use all C&EI trains; and by the chamber of commerce (representing 116 manufacturing firms) as part of its program to promote improvement in transportation. Several manufacturing organizations indicated that some of their employees occasionally use the trains. Spokesmen for three civic organizations use the trains several times a year, particularly during inclement weather, but also have used alternate transportation, including private automobile. A number of the witnesses testified that the northbound train is frequently late and dirty, that this was reported to the railroad and that there was little effective response.

At Evansville, the mayor and a State senator opined that discontinuance of the trains would be detrimental to the growth of industry and commerce in the community. The

mayor uses air service on many occasions and uses rail service about once every 6 months. The senator does not have occasion to use C&EI's service. The chamber of commerce spokesman urged that the discontinuance be deferred until L&N acquires the eastern side of C&EI's line, although the transportation division which he represents voted six to three against opposing discontinuance. An aide to a member of Congress from Indiana presented the Congressman's views that rail passenger transportation service is vital to the economic growth of the community, and that all modes of transportation must be kept available. Other witnesses testified to a preference for rail over alternate modes for the occasional trips they take, though some of them found the rail cars crowded, dirty and sometimes unheated. Among them was the representative of a religious community having 30 nuns stationed at Evansville. She indicated that her order's recent transportation requirements were accomplished through use of charter bus service, and that the sisters have sufficient automobiles at their disposal.

At Vincennes, the mayor opposed the discontinuance but, in so doing, was not supported by the city council. The chamber of commerce mailed 475 questionnaires to area residents regarding the proposed discontinuance; 82 were returned showing a 3 to 1 preference for keeping the trains on. A survey at Vincennes University revealed that 22 of the 2,243 students use the trains. Members of the faculty use them twice a year. Seven students said they hope to use them more frequently, particularly during bad weather. A number of other witnesses—all of them only occasional users—complained about the condition of the trains and the station at Vincennes, about a poor on-time

record, crowded and dirty equipment. All of the above witnesses urge continuation of the service with improvement of quality.

At Terre Haute, the mayor pressed the view that passenger train service is needed in the development of industry and commerce. On his six trips to Chicago in the past year he used train service once when his air flight was grounded on account of bad weather. The chamber of commerce cited statistics showing growth in population, commerce, enrollment in the universities and retail sales as yardsticks of a demand for improved service. Aware that loss of mail revenues has precipitated discontinuance of passenger rail service, it argued that the railroad should consider providing complete service, freight and passenger, and should look to the passenger market as any other business man looks at a new market. Further, that a successful company expects to absorb departmental losses within its gross earnings in order to provide a complete service. Professors and students of a local university, opposing the discontinuance, testified to their use of the trains variously from regular weekend use to once or twice a year during inclement weather. Student ownership of automobiles by upperclassmen is permitted and some of the students use the trains only when they cannot obtain automobile transportation. Student use of the trains is primarily on holidays and at the beginning and end of summer vacation. While enrollment at the local university has more than doubled in the past 6 or 7 years, use of the trains at Terre Haute has continued to decline.

A religious order with national headquarters at nearby St. Mary of the Woods has 350 members who ride the trains to Chicago twice annually for connections east and west

thereof. The order has a number of automobiles at its disposal and has used them and bus service for Chicago trips. In advertising for its college the order would like to be in a position to advise prospective students that easy access is available via rail among other modes. It has had some difficulty with on-time performance of the trains, particularly in making connections. The college has about 400 students, a number of whom are from the Chicago area.

Some evidence was presented to show the carrier's car-cleaning program and the problems involved. Sometimes delay in arrival at Chicago requires quick turnaround, and cleaning of the cars leaves much to be desired. The record indicates that C&EI has made some effort to overcome the problem but must deal with C&WI which maintains the Chicago terminal facility.

Discussion and conclusions.—Numerous factors are considered in determining whether to order the continuance of service under section 13a(1) of the act. Among them are public use of the service, population of the area, effect of a train discontinuance upon the communities served, available alternate transportation, financial results of the operation, prospects for the future, and the carrier's financial condition. The weight to be given each factor depends on the circumstances in a particular case. No one factor is necessarily controlling. The intent of Congress in enacting section 13a was to enable carriers to discontinue train services that no longer pay their way, and for which there is no longer sufficient public need to justify the financial loss involved. See *Southern Ry. Co.* v. *North Carolina*, 376 U.S. 93.

At one time the passenger train was the pride of the transportation system. This was especially so in the United

States where there was vast wilderness to be tamed, rich deposits of natural resources to be tapped, and large, widely-separated cities to be connected. The railroad and its passenger trains provided the strands for tying the far-flung areas together, and the channels for rapid, efficient communication and transport. Time and inventive genius created more efficient means for performing a number of the functions for which we formerly relied on the rails. Electronics provide instant communication, and airplanes cut transport time tremendously for people, mail and express. The automobile and the super highway—for which the American people have a special fascination—provide particular convenience which other modes cannot duplicate.

The evidence now before us shows that the subject trains no longer are used by express shippers (except for some movements between Chicago and Chattanooga), or by the Post Office Department for mail (once a highly remunerative source of traffic and a primary source of sustenance for passenger trains). Passenger traffic has been dwindling. In the meantime, costs continue upward inexorably. The general rise in costs throughout the economy are reflected in the railroad's expenses for employees, equipment, fuel, supplies, facilities and services. With the loss of mail revenues making a dramatic change in the financial results of the operation, C&EI would have to absorb an out-of-pocket deficit well over $400,000 per year in order to continue trains Nos. 93 and 54. It is likely that the deficit would go beyond a half million dollars.

Financially, this carrier is at best marginal. It has a history of deficit operation and is beset with numerous problems flowing therefrom regarding rehabilitation of its

line and recovery of traffic. See *Missouri Pac. R. Co.-Control-Chicago & E. I. R. Co.*, 327 I.C.C. 279 (1965). The slender profit shown on this record for 1965 and 1966 occurred at the height of a record breaking period of national prosperity. The relatively slight slowdown in the national economy during 1967 had an immediate and telling effect on C&EI's operation, creating a net deficit of nearly $2 million in the first 7 months of the year. C&EI is an important link in the national rail system and from the point of service in its own area and as an integral part of the national system, its viability is a thing much to be desired. Continuance of the subject trains would militate against that objective. There is no reasonable prospect for relief from the financial burdens imposed by those trains. To the contrary, all indications are that the burdens would mount. And this, in turn, would soon intensify the railroad's malaise, all to the detriment of the public.

The people who have been using the trains for travel have done so largely on an occasional or standby basis. Their primary means of conveyance are the automobile and other nonrail modes. The testimony of the governmental leaders, business representatives, students and housewives is clear proof of that. The witnesses themselves appear to prefer air and automobile travel. Many gave opinions about a need for rail passenger service in the interest of community and commercial growth, but few hard, realistic facts were advanced by them in support. The passenger-use statistics stand as stark proof that, regardless of what is felt and said, the people along the C&EI's Evansville-Chicago line are not using the trains. Their patronage is minimal.

For those who must depend upon public transportation, bus service is far more plentiful than the train service—at all points on the line. Use of the buses will require an adjustment, but whatever inconvenience might be experienced does not outweigh, on the scale of the public interest, the tremendous burden continued operation of the trains would involve. We conclude that discontinuance by C&EI of trains Nos. 93 and 54 is consistent with the purpose of section 13a(1) of the act, and the objectives of the national transportation policy.

Certain railway employees seek imposition of the *Burlington* or similar conditions in the event the discontinuance is authorized. Similar requests have been considered in prior proceedings of this nature, and the Commission has uniformly held that we do not possess authority to impose conditions for the protection of railway employees who may be adversely affected as a result of the discontinuance of passenger service under section 13a(1). See *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59. However, the probable effect of such discontinuance on employees is a matter to be considered in determining whether the public convenience and necessity require the continuance of such service. We have considered that factor, and, in our opinion, the probable adverse effect upon employees does not afford sufficient grounds to order continuance of the service.

Contentions of the parties as to fact or law not specifically discussed herein have nevertheless been considered and found to be without merit or material significance.

We find that the operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not re-

quired by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce.

An appropriate order will be entered discontinuing the investigation herein.

ORDER

At a session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 25th day of January 1968.

Finance Docket No. 24725

Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill. and Evansville, Ind.

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division, dated September 18, 1967, a hearing having been held and the said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this investigation be, and it is hereby discontinued, and that this order shall be effective 35 days from the date hereof.

By the Commission, division 3.

H. Neil Garson,
Secretary

(SEAL)

APPENDIX A

Statement of revenues and expenses for trains Nos. 93 and 54 in 1965, 1966 and 6 months of 1967

	1965		1966		Six Months 1967	
	Train No. 93	Train No. 54	Train No. 93	Train No. 54	Train No. 93	Train No. 54
Revenues:						
102 Coach (1)	$ 516,762	$ 480,139	$ 532,953	$ 468,549	$ 235,039	$ 197,355
102 First class (1)	90,032	122,097	87,680	113,593	33,431	45,172
103-108 Baggage & other (1)	1,606	493	2,270	1,153	2,970	1,315
106 Mail-RPO (1)	81,043	62,304	82,843	82,843	12,483	12,483
106 Mail-storage (1)	305,137	50,856	305,621	96,111	110,350	37,510
107 Express (1)	4,311	906	2,955	4,762	7,258	4,436
131 Dining & buffet (1)	45,876	45,875	47,844	47,844	18,910	18,910
Total Revenue	1,044,765	762,668	1,062,166	814,855	420,147	317,181
505-538 Car hire, net (1)	51,842	48,488	21,328	2,008	(280)	(5,900)
Total Income (2)	1,096,607	811,156	1,083,494	816,863	420,187	311,281
Total Expense (See below)	1,001,950	862,270	1,125,287	1,022,127	522,421	477,387
PROFIT OR (LOSS)	94,657	(51,114)	(41,793)	(205,264)	(102,234)	(166,106)
Maintenance of Equipment:						
311 Repairs, diesel locomotives (3)	54,497	54,897	70,299	70,959	26,703	26,695
317 Passenger-train cars-Repair (4)	89,300	72,511	174,853	163,022	75,937	70,864
331 Equip.Deprn.(52)Loco.(5)	12,996	12,996	12,996	12,996	6,498	6,498
331 Equip.Deprn.(54)Pass.Cars(6)	36,051	35,739	59,211	58,431	28,498	27,882
335 Emp. H&W benefits (7)	2,354	2,175	2,916	2,841	1,299	1,250
Traffic:						
351-360 Passenger Traffic (8)	17,896	13,539	19,959	14,914	10,998	8,018
Transportation:						
373 Station employees (9)	67,445	26,764	64,723	29,276	24,154	11,641
376 Sta. supplies & exp. (10)	2,568	2,568	2,568	2,568	1,531	1,384
378 Yard Cond. & Brkmn. (11)	3,436	3,436	1,661	1,661	1,832	1,832
392 Train enginemen (1)	48,669	51,395	47,803	50,369	23,674	24,517
394 Train Fuel.(3)	58,187	58,614	46,150	46,583	18,407	18,401
397 Water for train Loco. (3)	1,506	1,517	2,486	2,510	1,078	1,078
398 Lubs. for train Loco. (3)	2,746	2,766	3,127	3,156	2,245	2,245
399 Other supplies for train loco. (3)	649	654	377	380	101	101
400 Enghse. expense train (3)	14,820	18,929	12,395	12,511	4,909	4,908
401 Trainmen (1)	61,163	61,861	64,651	65,937	29,278	29,201
402 Train supplies & exp. (12)	64,778	57,268	89,105	84,673	47,025	44,627
403 Operating sleeping cars (1)	44,199	49,385	41,171	31,561	24,530	18,696
409 Emps. H&W benefits (13)	7,727	6,134	6,394	5,508	2,459	2,468
insurance (1)	12,172	12,172	12,178	12,178	8,766	8,766
415 Clearing wrecks (1)	---	---	4,987	---	---	---
419 Loss & damage-baggage (1)	230	20	492	492	444	444
420 Injuries to persons (1)	78,350	2,375	22,782	2,593	17,000	1,647
441 Dining & buffet serv. (1)	69,161	69,161	76,839	76,839	33,594	33,594
General:						
452 Clerks, accounting (14)	13,566	13,464	10,972	10,292	4,571	4,129
456 Emps. H&W benefits (15)	580	576	429	404	180	162
All Joint Facility Accounts (16)	212,554	215,158	244,132	236,092	119,698	113,697
532 Ry. tax accruals (17)	24,350	20,196	29,631	25,381	16,992	10,622
TOTAL EXPENSES:	1,001,950	862,270	1,125,287	1,022,127	522,421	477,387

NOTES:

(1) Actual.
(2) Revenue plus car hire.
(3) Passenger portion of account divided by passenger unit-miles times unit-miles per train.
(4) Passenger portion of account divided by passenger car-miles exclusive of sleeping car-miles times actual car-miles per train.
(5) At I.C.C. rates distributed to trains on basis of units assigned.
(6) At I.C.C. rates distributed to trains on basis of actual car-miles.
(7) G.M.A. rates applied to labor portion of accounts Nos. 311 and 317.
(8) Distributed on basis of revenue pro rata.
(9) Includes mail handlers, also C&EI station employees.
(10) Trains Nos. 93 and 54's portion of Danville depot expense.
(11) Evansville border - actual.
(12) Passenger portion of account divided by passenger car-miles including sleeping car-miles.
(13) G.M.A. rates applied to labor portion of accounts Nos. 373, 378, 392 and 401.
(14) Revenue pro rata of actual wages.
(15) G.M.A. rates applied to labor portion of account No. 452.
(16) Savable portion of joint facility expense at Chicago, Terre Haute, Vincennes and Evansville.
(17) R.R. and U.I. rates (G.M.A.) applied to labor portion of accounts Nos. 311, 317, 331 through 360, 373, 378, 392, 401 and 452.

Service Date
May 15, 1968

Corrected Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 8th day of May, 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL. AND EVANSVILLE, IND.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the order of the Commission, Division 3, acting as an Appellate Division, dated May 8, 1968, and served earlier on May 15, 1968, erroneously indicated that the Commission had granted the petition insofar as it sought dismissal of the above-titled proceeding for failure to properly invoke this Commission's jurisdiction under section 13a(1);

It further appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5 (j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service proposed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance;

It further appearing, That applicant in the above-titled proceeding gave the proper notice required, as described above; and

It further appearing, That no other new issues are raised or evidence of substance offered to support the request for reconsideration, and good cause has not been shown for granting the relief requested;

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition for reconsideration be, and it is hereby, denied in all respects.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, et al.,

Defendants.

Civil Action — No. 68 C 956

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that Chicago & Eastern Illinois Railroad Company, one of the above-named defendants, hereby appeals to the Supreme Court of the United States from the order, entered in this action on March 19, 1970, consolidating this action with *Tennessee Public Service Commission, et al.* v. *United States of America, et al.*, N.D. Ill., Civil Action No. 68 C 1666, vacating the orders of the Interstate Commerce Commission theretofore entered in each action, and remanding both actions, as consolidated, to the Interstate Commerce Commission for further proceedings.

This appeal is taken pursuant to 28 U.S.C. §1253.

II.

In accordance with the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the Clerk of

this Court is hereby requested to certify the entire record in this cause and provide for its transmission to the Clerk of the Supreme Court of the United States.

/s/ *Keith F. Bode*
Keith F. Bode
Jenner & Block
135 South LaSalle Street
Chicago, Illinois 60603

C&EI filed the foregoing Notice of Appeal in the United States District Court for the Northern District of Illinois on April 17, 1970, together with proof of service, and served copies upon all parties of record by mail on the same day.

APPENDIX E

Interstate Commerce Act. Title 49, United States Code: Section. 13a(1).

A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may

require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

49 C.F.R., Part 1122 (1970 Ed.):

§ 1122.1 Scope of rules in this part.

The rules in this part govern the procedure to be followed by carriers subject to part I of the Interstate Commerce Act which, under and pursuant to the provisions of section 13a of said act, file with the Commission a notice under paragraph (1) of said section or a petition under paragraph (2) thereof with respect to a proposed discontinuance or change, in whole or in part, of the operation or service of any train or ferry.

§ 1122.2 Definitions.

As used in this part:

(a) The term "act" means the Interstate Commerce Act, as amended.

(b) The term "notice" means a notice as provided for in paragraph (1) of section 13a.

(c) The term "petition" means a petition filed with the Commission under the provisions of paragraph (2) of section 13a for authority to effect a discontinuance or change.

§ 1122.3 Form and style of notice.

The notice shall be reproduced by printing, multigraphing, or mimeographing (or by any other process provided the copies are clearly legible) on paper not less than 8½ by 11 inches, with the words, "Notice of proposed change (or discontinuance, if appropriate) of service" printed in large bold-face type near the top. If printed, nothing less than 12-point type shall be used in the remainder of the notice.

§ 1122.4 Contents of notice.

A separate notice shall be given for each discontinuance or change of service. A single notice may include more than one train or ferry except that unrelated trains or ferries shall not be made the subject of a single notice. Each notice shall set forth the following information:

(a) Exact corporate name and general office address of the carrier.

(b) The number and name or other description of the train or ferry with respect to which a discontinuance or change of operation or service is proposed, the name of each station, depot, or facility affected thereby, and the termini between which the train or ferry operates.

(c) The date on which the discontinuance or change of operation or service is proposed to become effective.

(d) Advice to the public that persons desiring to object to the proposed discontinuance or change should notify the Interstate Commerce Commission, at Washington, D.C., of such objection and the reasons therefor at least 15 days before the effective date of the proposed discontinuance or change.

§ 1122.5 Information required with notice.

With each notice of a proposed discontinuance or change of operation or service, there shall be filed with the Commission a "Statement in Relation to Proposed Discontinuance or Change of Train or Ferry Service" which, in the body thereof or in exhibits attached thereto and referred to therein, shall contain the following:

(a) Exact corporate name and general office address of the carrier proposing the discontinuance or change.

(b) Name, title, and post office address of counsel or officer to whom correspondence in regard to the notice should be addressed.

(c) Complete description of the present service of the train or ferry involved and of the discontinuance or change of operation or service proposed.

(d) Complete statement of the reasons for the proposed discontinuance or change of operation or service.

(e) The names of all railroads interchanging passengers or freight with the subject train or ferry, and the points of such interchange.

(f) Description of other common carrier service, including service of the subject carrier, of the same kind (passenger or freight) rendered by the trains or ferries involved, between and at the points described in the notice and other common carrier service available in the immediate territory.

(g) A statement of the traffic transported on trains or ferries involved for each of the last 2 calendar years and for the part of the current year for which such information is available. If information for such periods is not submitted, explanation must be given as to why such information was not submitted. When a notice involves more than one train or ferry, the traffic of each should be segregated to the extent practicable. If the proposed discontinuance or change involves less than all of the stations served by a train or ferry, to the extent such information is available segregation should be made of the traffic transported to and from each station which will be affected.

(h) Financial results of operating the trains or ferries involved during the period or periods embraced in the statement submitted pursuant to paragraph (g) of this section, segregated in the same manner and to the same extent as required by that paragraph.

(i) A copy of the carrier's general balance sheet statement as of the latest date available; and of its income statements for each of the last two calendar years and for that portion of the current year for which such information is available.

(j) A certificate that a copy of the notice and of the "Statement in Relation to Proposed Discontinuance or Change of Train or Ferry Service" has been mailed to the Governor and railroad regulatory body of each State in which the subject train or ferry is operated and that such notice has been posted in a conspicuous place in each station, depot, or other facility involved, including each ferry and each passenger car on trains affected, which certificate shall include information of the date or dates on which the notice and statement were mailed and the date or dates on which the notice was posted as aforesaid and that a copy of the notice and statement were served upon the Assistant Postmaster General, Bureau of Transportation and International Services, Washington, D.C. 20260 and the Railway Labor Executives' Association, Washington, D.C. 20001.

(k) Map showing the geographic situation of the line over which the train operates, or, if a ferry, the route traversed. The map should show the line or route clearly, by color or otherwise, and the stations thereon, on a sheet not smaller than 8½ x 11 inches. Three copies of the map should be submitted unbound for use of the Commission, in addition to those attached to the statement.

§ 1122.6 Petition.

Petitions for authority to effect a discontinuance or change of the operation or service of a train or ferry shall contain in the body thereof or in exhibits attached thereto and referred to therein, the information required by paragraph (b) of § 1122.4 of this part, that required by §1122.5 excepting paragraph (j) thereof, and in addition the following:

(a) The date on which the petition or application for discontinuance or change in the operation or service of the train or ferry was filed with the appropriate State authority.

(b) Identification of the State authority with which such petition or application was filed.

(c) Description of the action, if any, taken by such State authority on the petition or application filed with it.

(d) To be filed only with the original of the petition to the Commission, copy of the record made before the State authority, including copies of the application or petition to it, transcript of any oral hearing, and decision and order, if any.

§ 1122.7 Execution.

The original copy of the statement required by § 1122.5 and of a petition as described in § 1122.6 shall be signed in ink by an executive officer of the carrier having knowledge of the matters and things therein set forth. Persons signing the statement or petition shall also sign a certificate in form as follows:

..... hereby certifies that he is the
(Name)

..... of the .....
(Title)

..... petitioner
(Corporate name of petitioner)

herein; that he has been authorized by proper corporate action on the part of said petitioner, or by the proper court, to execute and file with the Interstate Commerce Commission the foregoing statement (or petition); that he has carefully examined all of the statements referred to in said statement (or petition) and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth therein; and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

.....
(Signature)

Dated this ..... day of ....., 19.....

§ 1122.8 Filing; copies.

As applicable, 8 copies of the notice and an original and 7 copies of the accompanying statement, or an original and 7 copies of the petition shall be filed with the Secretary of the Commission, Washington, D.C. Each copy of the statement or petition shall bear the dates and signatures that appear in the original and shall be complete in itself; but the signatures in the copies may be stamped or typed.

Judicial Code, Title 28, United States Code:

Section 2325.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

APPENDIX F

C&EI Trains 93 and 54 ————————

L&N Connecting Trains — — — — — — (*)

Trains Involved in the L&N Case —| —| —| —|

Chicoutimi
NEW BRUNSWICK
MAINE
QUEBEC
FREDERICTON
Saint John
Port Arthur
Ft. William
Sault Ste. Marie
Sudbury
Hibbing
Duluth
Superior
WISCONSIN
Iron Mountain
MICH
Marquette
Escanaba
OTTAWA
CANADA
Montreal
Hull
Sherbrooke
Granby
Rangor
AUGUSTA
Portland
VT.
N.H.
Burlington
MONTPELIER
Waterbury
Watertown
NEW YORK
Utica
Schenectady
ALBANY
Rochester
Syracuse
Auburn
Binghamton
Elmira
Jamestown
Buffalo
TORONTO
Hamilton
London
Port Huron
Sarnia
Saginaw
Bay City
Grand Rapids
Muskegon
Lansing
Kalamazoo
Jackson
Detroit
Windsor
MICHIGAN
Traverse City
Alpena
Lake Michigan
Green Bay
Appleton
Oshkosh
Fond du Lac
Milwaukee
Racine
Kenosha
Waukegan
Chicago
Gary
South Bend
Elkhart
Toledo
OHIO
Akron
Canton
Cleveland
Youngstown
Erie
Pittsburgh
Johnstown
Harrisburg
PENNSYLVANIA
Williamsport
Wilkes Barre
Scranton
Reading
Allentown
Philadelphia
Camden
Wilmington
Atlantic City
TRENTON
New York
HARTFORD
Springfield
Worcester
BOSTON
PROVIDENCE
Newport
Atlantic Ocean
Rochester
Mason City
Dodge City
Waterloo
Dubuque
Cedar Rapids
Davenport
Rock Island
Galesburg
Peoria
Bloomington
Decatur
Springfield
Quincy
Hannibal
St. Joseph
Kansas City
Lawrence
Sedalia
JEFFERSON CITY
St. Louis
E. St. Louis
Alton
Joplin
Springfield
Cape Girardeau
ARKANSAS
Jonesboro
Jackson
Memphis
Muskogee
Ft. Smith
LITTLE ROCK
Alester
Hot Springs
Texarkana
El Dorado
Greenville
LOUISIANA
Vicksburg
Meridian
Tyler
Shreveport
Monroe
JACKSON
Alexandria
Hattiesburg
BATON ROUGE
Beaumont
Lake Charles
New Orleans
Port Arthur
Galveston
Gulf of Mexico
Danville
Terre Haute
Covington
INDIANAPOLIS
Cincinnati
Portsmouth
Louisville
Ashland
Lexington
Hazard
KENTUCKY
Bowling Green
Middlesboro
Paducah
Hopkinsville
Cairo
TENNESSEE
NASHVILLE
Knoxville
Johnson City
Bristol
Kingsport
Hurtington
CHARLESTON
Bluefield
Roanoke
Lynchburg
Petersburg
Clarksburg
Parkersburg
Marietta
Zanesville
Newark
COLUMBUS
Springfield
Dayton
Lima
Marion
Wooster
Canton
Akron
Lorain
Toledo
Elkhart
Gary
Kokomo
Muncie
Danville

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 17 1970
JOHN F. DAVIS, CLERK

Nos. 386, 387, 396 and 410

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 386

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

CITY OF CHICAGO, et al., *Appellees*.

No. 387

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Appellees*.

No. 396

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellant*,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Appellees*.

No. 410

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, *Appellant*,

v.

CITY OF CHICAGO, et al., *Appellees*.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

(Names of counsel appear inside front cover)

August, 1970

Washington, D. C. - [illegible]

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No. 410

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, *Appellant*,

v.

CITY OF CHICAGO, et al., *Appellees*.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees City of Chicago, Tennessee Public Service Commission, The Metropolitan Government of Nashville and Davidson County, Tennessee, Village of Milford, City of

Watseka, City of Hoopeston, City of Danville, City of Terre Haute, City of Vincennes, City of Henderson, Indiana Public Service Commission, Georgia Public Service Commission, Alabama Public Service Commission, Mississippi Public Service Commission, Kentucky Railroad Commission, State of Louisiana, Public Utilities Commission of Ohio, Railway Labor Executives' Association, Maurice F. Radrizzi (United Transportation Union), United Transport Service Employees (AFL-CIO), and National Association of Railroad Passengers, move that the judgment of the district court be affirmed.

STATEMENT

These are four appeals from a final judgment of a three-judge district court, setting aside orders of the Interstate Commerce Commission involving the "Georgian-Hummingbird" passenger train service of the Louisville & Nashville Railroad Company (L&N),[1] remanding the proceedings to the Commission, and reinstating the restraining order barring discontinuance of the "Hummingbird".[2] The judgment was entered upon reserved issues, together with subsequent proceedings, following remand last term in *City of Chicago v. United States*, 396 U.S. 162.[3]

---

[1]The appellant in No. 410, Chicago & Eastern Illinois Railroad Company, sold its Chicago, Ill.-Evansville, Ind. line to L&N on June 5, 1969, as contemplated in *Missouri Pac. R. Co.-Control-Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), affirmed sub nom. *Illinois Central Railroad Company v. United States*, 263 F. Supp. 421 (N.D. Ill. 1966), aff'd *per curiam* 385 U.S. 457 (1967). We are at a loss to explain C&EI's continued participation in this passenger train proceeding. See also: *Louisville & N.R. Co.-Pur.-Chicago & E.I.R. Co.*, 334 I.C.C. 273 (1968) and *Louisville & N.R. Co.-Trackage Rights*, 334 I.C.C. 412 (1969).

[2]The "Hummingbird" was abruptly discontinued in mid-run at Birmingham, Ala., discharging its passengers. For an account of this event, see the weekly *Traffic World*, Vol. 137, No. 3, at p. 45 (Jan. 18, 1969).

[3]The prior district court opinions are reported at 294 F. Supp. 1103, 1106. The instant order is not reported.

The judgment below involved two actions which were consolidated. The appeals in Nos. 386 and 410 concern the discontinuance by Chicago & Eastern Illinois Railroad Company (C&EI) of its segment of the "Georgian" passenger train. The "Georgian" was jointly operated by C&EI and L&N between Chicago, Ill. and Atlanta, Ga., C&EI transporting the train between Chicago, Ill. and Evansville, Ind. (287 miles), and L&N between the latter point and Atlanta, Ga. (444 miles). The "Georgian" connects at Nashville, Tenn. (159 miles below Evansville) with the "Hummingbird", the latter train being operated by L&N between Cincinnati, Ohio and New Orleans, La. Coaches and sleepers are transferred between the two trains at Nashville. Thus passengers may board the "Georgian" at Chicago in the early evening and arrive the following morning at Birmingham, Ala. on the "Hummingbird", whereas passengers destined for Atlanta, Ga. would continue on the "Georgian".

C&EI filed a notice with the Commission that it would discontinue its segment of the "Georgian" between Chicago, Ill. and Evansville, Ind. Notice was not served upon the Governors of Kentucky, Tennessee, Alabama or Georgia; notice was not posted at stations south of Evansville, Ind.; and the notice as posted specified only "Trains Nos. 93 & 54", making no mention of the through-route nature of the train. After hearings in Illinois and Indiana, the Commission allowed discontinuance of C&EI's segment by report entered January 25, 1968. 331 I.C.C. 447. Certain protestants petitioned for reconsideration, maintaining that the carrier had not effectively-invoked the jurisdiction of the Commission. The Commission initially ruled in protestants' favor by dismissing the entire proceeding for failure of C&EI to effectively-invoke the Commission's jurisdiction. (App. A) However, the order on reconsideration, issued May 15, 1968 at 9:30 a.m., was replaced by a so-called "corrected order" served at 3:00 p.m. the same day. The "corrected order" denied reconsideration in all respects. (App. B) Plaintiffs instituted their action to set aside the "Georgian" decision on May 27, 1968 in the court below.

The appeals in Nos. 387 and 396 involve the "Hummingbird" train between Cincinnati, Ohio and New Orleans, La. When C&EI was permitted by the Commission to discontinue its Chicago-Evansville segment of the "Georgian", L&N posted notice that it would discontinue the "Hummingbird", stating to the Commission that the C&EI discontinuance resulted in the loss of the bulk of the passenger business on the "Hummingbird.":

> "On February 1, 1968, the Chicago and Eastern Illinois Railroad Company discontinued its passenger trains Nos. 93 and 54 between Chicago, Illinois and Evansville, Indiana, which connected with the L&N passenger trains operating between Evansville, Indiana and Atlanta, Georgia. These latter trains also carried passengers traveling between Chicago, Illinois, stations on the C&EI intermediate to Evansville, Indiana and stations on the L&N served by Nos. 6 & 7 between New Orleans and Nashville, Tenn. The discontinuance of said C&EI trains resulted in the immediate loss of the bulk of the passenger business handled on trains Nos. 6 & 7 between New Orleans and Cincinnati."

The Commission on September 3, 1968 entered its report allowing the discontinuance of the "Hummingbird" over its run between Cincinnati, Ohio and New Orleans, La. 333 I.C.C. 720. The Commisison in its decision took note of the then-pending judicial review proceedings involving C&EI's discontinuance of its segment of the "Georgian", and stated that developments in the "Georgian" case might change the picture for the "Hummingbird." (No. 387, J.S., pp. 32-33) Plaintiffs instituted an action for judicial review of the "Hummingbird" on September 6, 1968 in the court below, and secured a restraining order against discontinuance of the train.

The "Georgian" and "Hummingbird" cases were both argued together on November 4, 1968. The complete agency records were lodged with the court at that argument. Plaintiffs moved for summary judgment in the "Georgian" case,

maintaining that all stations on the line between Evansville, Ind. and Atlanta, Ga. should have been posted, and each of the Governors served with the notice. Plaintiffs argued for summary remand of the "Hummingbird" on the face of the report, and requested consolidation. C&EI and L&N moved for dismissal of both actions for lack of subject-matter jurisdiction.

The court below dismissed both actions, expressly reserving decision on all other questions. The restraining order against discontinuance of the "Hummingbird" was dissolved. 294 F. Supp. 1103, 1106. This court reversed. *City of Chicago v. United States*, 396 U.S. 162. During the course of the case here last term, L&N attempted to discontinue the remaining segments of the "Georgian". In denying discontinuance, the Commission set forth the history of this litigation. 336 I.C.C. 81 at 84-86. The Commission's report is set forth herein as Appendix C.[4]

The court below found on remand that in the proceedings before the Commission relating to the discontinuance of C&EI's "Georgian" trains the public did not receive adequate notice from the railroads or of the Commission proceedings; and, further, although the residents of the area south of Evansville, Ind. were vitally interested in continued through passenger service by the railroads and the respective governors of those States were entitled to notice of the proceedings before the Commission, no notice was given them beforehand. (No. 386, J.S., p. 15) The interrelated proceedings were consolidated, and remanded to the Commission. The status quo which existed on September 6, 1968 was ordered restored, and the "Hummingbird" restraining order was reinstated. A stay of the order reinstating the "Hummingbird" was requested by

[4]The Commission's order required continued operation for a period of six months from December 3, 1969, or to and including June 3, 1970. L&N on June 4, 1970, filed a new section 13a(1) notice, and the Commission has instituted a new investigation. Finance Docket No. 26221. A decision is anticipated on or about November 6, 1970, when the interim four-month continuance order will expire. Public hearings were concluded August 14, 1970 at Atlanta, Ga.